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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ANNA L. MIRANDA, *on behalf of herself and all others similarly situated,*

Plaintiff,

- v -

Civ. No. 1:15-CV-0627 (LEK/DJS)

CACH LLC and DANIELS NORELLI SCULLY & CECERE, P.C.,

Defendants.

APPEARANCES:	**OF COUNSEL:**
KAKALEC & SCHLANGER, LLP *Attorney for Plaintiff* 85 Broad Street, 18th Floor New York, N.Y. 10004	DANIEL A. SCHLANGER, ESQ.
LAW OFFICE OF ANTHONY J. PIETRAFESA *Attorney for Plaintiff* 118 Wendell Terrace Syracuse, N.Y. 13203	ANTHONY J. PIETRAFESA, ESQ.
BARRON & NEWBURGER, P.C. *Attorney for Defendant CACH, LLC* 30 South Main Street New City, N.Y. 10956	ARTHUR SANDERS, ESQ.
DAVIDSON FINK LLP *Attorney for Defendant Daniels Norelli Scully & Cecere, P.C.* 28 East Main Street, Suite 1700 Rochester, N.Y. 14614	GLENN M. FJERMEDAL, ESQ.

DANIEL J. STEWART
UNITED STATES MAGISTRATE JUDGE

MEMORANDUM-DECISION and ORDER

Before this Court is Plaintiff's Motion to Amend the Complaint to add four additional parties: SquareTwo Financial Corporation ("SquareTwo"), James Scully, Esq., Paul A. Larkins, and P. Scott Lowery. Dkt No. 39, Pl.'s Mot. to Am. Defendants oppose the Motion either in whole or in part. Dkt. Nos. 42, 43, 47, & 48. For the reasons set forth below, the Plaintiff's Motion is **granted in part and denied in part**.

I. BACKGROUND

A. Complaint and Procedural History

Plaintiff commenced this action on May 21, 2015, alleging a violation of the Fair Debt Collection Practices Act ("FDCPA") as well as a state law claim under § 349 of the New York State General Business Law. Dkt. No. 1, Compl. According to the Complaint, Plaintiff was sued in Schenectady City Court by CACH LLC ("CACH") through its attorneys Daniels Norelli Scully & Cecere P.C. ("DNSC"), in order to recover on an alleged defaulted consumer debt. *Id.* at ¶¶10-18. In connection with that civil suit, Plaintiff was served with a summons, the content of which forms the heart of the action. In particular, the summons served upon Plaintiff and issued by Defendant CACH and its counsel DNSC, stated in pertinent part:

> (b) If this summons is served by delivery to any person other than you personally or is served outside the COUNTY OF SCHENECTADY or by publication or by any means other than personal delivery to you within the COUNTY OF SCHENECTADY you are allowed THIRTY days after proof of service is filed with the clerk of this court within which to appear and answer.

Id. at ¶ 24.

In fact, alleges Plaintiff, the rule in New York is that, for substituted service, the time period to appear and answer a complaint runs thirty days after service is complete, *not* thirty days after proof of service is filed with the court. *Id.* at ¶¶ 31-33. Service is not complete until ten days after the affidavit of service has been filed with the City Court. *See* N.Y. C.P.L.R. § 308(2) ("[S]ervice shall be complete ten days after such filing."). Thus, the summons provided to Plaintiff was materially deficient in that it falsely set a deadline for Plaintiff's appearance and answer which was ten days prior to when it was actually due. Compl. at ¶ 69. According to Plaintiff, this false statement was compounded when she was sent a follow-up letter by Defendant DNSC noting that her time to answer the Complaint was limited and requesting that she call their offices to discuss settlement and payment options. *Id.* at ¶ 39. The case has been styled as a purported class action in light of the fact that, according to Plaintiff's information and belief, the defective summons has been used as a matter of course by the Defendant DNSC in numerous cases commenced in New York State. *Id.* at ¶¶ 37 & 43-44.

B. Proposed Amended Complaint

The Proposed Amended Complaint seeks to add four new Defendants, one additional claim, and numerous new facts. Dkt. No 39-2, Prop. Am. Compl. Initially, the Proposed Amended Complaint adds SquareTwo as a Defendant, and asserts a theory that SquareTwo is the alter ego of CACH. *Id.* at ¶¶ 117-25. The Proposed Amended Complaint alleges that CACH is a wholly owned subsidiary of SquareTwo; that they share the same physical address in Denver, Colorado; that they share the same leadership; that CACH conducts its business through SquareTwo employees and utilizes its management software; and that SquareTwo controls all collection activites of CACH and its various legal counsel, including DNSC, through a comprehensive compliance management system. *Id.* at ¶¶ 20-25.

With regard to proposed Defendants Larkins and Lowery, the Proposed Amended Complaint alleges that they are both managers at CACH and are, respectively, the President and CEO of SquareTwo, and "Special Senior Advisor" to the President and CEO. *Id.* at ¶ 25. The Proposed Amended Complaint alleges that Larkins and Lowery were debt collectors, and upon information

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and belief, had final, supervisory authority over the collection practices activities of CACH and SquareTwo. *Id.* at ¶¶ 28-29 & 36.

Finally, with regard to Defendant Attorney Scully, he is alleged to be a principal and owner of DNSC and to have final authority over all documents, including the form summons at issue, used by the law firm. *Id.* at ¶¶ 50-52.

C. Defendant's Opposition

Counsel for DNSC opposes the amendment on futility grounds. Dkt. No. 48. In particular, DNSC argues that the Proposed Amended Complaint identifies no act taken by Defendant Attorney Scully that violated the FDCPA, and that the claim that Scully oversaw and supervised the firm's collection activities is wholly conclusory. *Id.* at pp. 4-5. DNSC also argues that the proposed claim against Scully is insufficient as a matter of law because it contains no allegation showing any personal involvement by Scully in the collection action against Plaintiff. *Id.*

Counsel for CACH presents similar arguments insofar as the Motion to Amend seeks to add Defendants Lowery and Larkins. Dkt. No. 47. In particular, they note that the Proposed Amended Complaint does not allege that the two proposed individual Defendants participated, directed, or were even aware of the faulty summons that forms the basis of the Plaintiff's Complaint. *Id.* at pp. 4 & 7. Further, these individuals dispute that there exists personal jurisdiction over them, as they had no contact with New York and committed no improper act within the state. *Id.* at pp. 4-6. As a general matter, they note that the mere status as an officer or director of a corporation is an insufficient basis to establish either jurisdiction or liability under the FDCPA. *Id.* at pp. 4-8.

II. STANDARD OF REVIEW

A. Motion to Amend

FED. R. CIV. P. 15(a) states, in pertinent part, that leave to amend a pleading should be "freely given when justice so requires." *Tocker v. Philip Morris Co.*, 470 F.3d 481, 491 (2d Cir. 2006); *Ellis v. Chao*, 336 F.3d 114, 127 (2d Cir. 2003); *Manson v. Stacescu*, 11 F.3d 1127, 1133 (2d Cir. 1993). Indeed, leave to amend should be denied only in the face of undue delay, bad faith, undue prejudice to the non-movant, futility of amendment, or where the movant has repeatedly failed to cure deficiencies in previous amendments. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Kropelnicki v. Siegel*, 290 F.3d 118, 130 (2d Cir. 2002) (citing *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 271-72 (2d Cir. 1996)). District courts are vested with broad discretion to grant a party leave to amend the pleadings. *SCS Commc'ns, Inc. v. Herrick Co., Inc.*, 360 F.3d 329, 345 (2d Cir. 2004) (citing *Foman v. Davis,* 371 U.S. at 182, for the proposition that an "outright refusal to grant the leave without any justifying reason . . . is not an exercise of discretion [but] . . . merely [an] abuse of that discretion and inconsistent with the spirit of the Federal Rules"); *see also Local 802, Assoc. Musicians of Greater New York v. Parker Meridien Hotel*, 145 F.3d 85, 89 (2d Cir. 1998). "The party opposing a motion for leave to amend has the burden of establishing that granting such leave would be unduly prejudicial." *Media All., Inc. v. Mirch*, 2010 WL 2557450, at *2 (N.D.N.Y. June 24, 2010) (quoting *New York v. Panex Indus., Inc.*, 1997 WL 128369, at *2 (W.D.N.Y. Mar. 14, 1997)); *see also Lamont v. Frank Soup Bowl*, 2000 WL 1877043, at *2 (S.D.N.Y. Dec. 27, 2000) (citations omitted). This requires the non-movant to "do more than simply claim to be prejudiced." *Breyette v. Amedore*, 205 F.R.D. 416, 417 (N.D.N.Y. 2002) (quoting *Bryn Mawr Hosp. v. Coatesville Elec. Supply Co.*, 776 F. Supp. 181, 185 (E.D. Pa. 1991)).

The Second Circuit has stated that where futility is raised as an objection to the motion to amend, and

> [w]here it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend. *See, e.g.*, *Foman v. Davis*, 371 U.S. at 182 (denial not abuse of discretion where amendment would be futile); *Health-Chem Corp. v. Baker*, 915 F.2d 805, 810 (2d Cir.1990) ("where . . . there is no merit in the proposed amendments, leave to amend should be denied"); *Billard v. Rockwell Int'l Corp.*, 683 F.2d 51, 57 (2d Cir.1982) (denial not abuse of discretion where plaintiff had had "access to full discovery" in a related case).

Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993).

As futility is an appropriate basis for denying leave to amend, such denial should be contemplated within the standards necessary to withstand a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6). *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002) (citing *Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991)).

B. Joinder of a Party

As noted above, Rule 15(a) of the Federal Rules of Civil Procedure generally governs the amendment of complaints, but in the case of proposed amendments where new defendants are to be added, the Court must also look to Rule 21. *Ward v. LeClaire*, 2008 WL 182206, at *3 (N.D.N.Y. Jan. 15, 2008) (citing *United States v. Chilstead Bldg. Co.*, No. 96-CV-0641 (N.D.N.Y. Nov. 7, 1997) (McAvoy, C.J.) (citations omitted)). Rule 21 states that a party may be added to an action "at any time [and] on just terms." FED. R. CIV. P. 21.[1] Rule 21 is "intended to permit the bringing in of a person, who through inadvertence, mistake or for some other reason, had not been made a party and whose presence as a party is later found necessary or desirable." *Goston v. Potter*, 2010 WL 4774238, at *5 (N.D.N.Y. Sept. 21, 2010) (quoting *United States v. Commercial Bank of N. Am.*, 31 F.R.D. 133, 135 (S.D.N.Y. 1962) (internal quotations marks omitted)). "Addition of parties under Rule 21 is guided by the same liberal standard as a motion to amend under Rule 15." *Ward v. LeClaire*, 2008 WL 182206, at *3; *Varela v. Cty. of Rensselaer*, 2012 WL 1355212, at *7 (N.D.N.Y. Apr. 18, 2012) (citing *Fair Hous. Dev. Fund Corp. v. Burke*, 55 F.R.D. 414, 419 (E.D.N.Y. 1972)).

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[1] "Rule 21 cannot be read alone but must be read in the light of Rules 18, 19 and 20[.]" *United States v. Commercial Bank of N. Am.*, 31 F.R.D. 133, 135 (S.D.N.Y. 1962). In this respect, the federal rules state, in part, that "[p]ersons . . . may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action. FED. R. CIV. P. 20(a)(2). Rule 20(a)(2) is liberally construed "so as to promote judicial economy and to allow related claims
(continued...)

C. Motion to Dismiss Standard

On a motion to dismiss, the allegations of the complaint must be accepted as true. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972). Nevertheless, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The trial court's function "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980).

A motion to dismiss pursuant to Rule 12(b)(6) may not be granted so long as the plaintiff's complaint includes "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. at 678 (citing *Twombly*). In that respect, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory

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to be tried within a single proceeding." *Equal Emp't Opportunity Comm'n v. Nichols Gas & Oil, Inc.*, 518 F. Supp. 2d 505, 508-09 (W.D.N.Y. 2007) (citing, *inter alia*, *Barr Rubber Prods. Co. v. Sun Rubber Co.*, 425 F.2d 1114, 1127 (2d Cir. 1970)).

statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. at 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, in spite of the deference the court is bound to give to the plaintiff's allegations, it is not proper for the court to assume that "the [plaintiff] can prove facts [which he or she] has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). The process of determining whether a plaintiff has "nudged [his] claims . . . across the line from conceivable to plausible," entails a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. at 679 & 680.

III. DISCUSSION

A. Futility

Defendants' Counsel disputes the allegations of control and supervision contained in the Proposed Amended Complaint, and submits Affidavits from Larkins, Lowery, and Scully detailing their lack of involvement in the Miranda action or the preparation and use of the defective summons. *See* Dkt. Nos. 47-1, 47-2, & 48-1. In the first place, to the extent Defendants are challenging the veracity of Plaintiff's allegations, their contentions are premature and mistaken at this stage of the litigation. A review of a motion to amend, employing the Rule 12(b)(6) standard, is not an exercise in determining the merits of a claim or measuring the credibility or the extent of the actual facts. Such factual disagreements are not contemplated within a Rule 12(b)(6) framework, but rather are appropriately reserved for a Rule 56 analysis or at trial. FED. R. CIV. P. 56. Instead, the Court is

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required to accept the factual allegations in the Proposed Amended Complaint as true and, my true function, at this juncture, "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Eternity Glob. Master Fund Ltd. v. Morgan Guar. Trust Co. of New York*, 375 F.3d 168, 176 (2d Cir. 2004) (quoting *Geisler v. Petrocelli*, 616 F.2d at 639); *accord Looney v. Black*, 702 F.3d 701, 710 (2d Cir. 2012) (noting that courts "are bound to make [their] determination based only on the contents of the complaint"). Accordingly, at this stage and for purposes of the pending Motion, actual proof is not a requisite, but rather, whether the Proposed Amended Complaint sufficiently states factual allegations that are plausible.[2] *See New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 211 n.3 (2d Cir. 2006) (discussing its ruling in *Nettis v. Levitt*, 241 F.3d 186 (2d Cir. 2001) as to what is at stake at the motion to amend stage).

1. Scope of the FDCPA

A discussion of futility in this case must start with the scope and reach of the FDCPA. Congress enacted the FDCPA after finding "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Accordingly, the purpose of the FDCPA is "'to protect consumers from deceptive or harassing actions taken by debt collectors[,]' . . . with the purpose of 'limiting the suffering and anguish often inflicted by independent debt collectors.'" *Gabriele v. Am. Home Mortg. Servicing, Inc.*, 503 F. App'x 89, 93 (2d Cir. 2012) (internal citations omitted). "To further these ends, the FDCPA 'establishes certain rights for consumers whose debts are placed in the hands of professional debt collectors for

[2] Not to be misunderstood, the Court is not refuting either the veracity or credibility of Defendants' statements.

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collection.'" *Vincent v. The Money Store*, 736 F.3d 88, 96 (2d Cir. 2013) (citing *DeSantis v. Comput. Credit, Inc.*, 269 F.3d 159, 161 (2d Cir. 2001)). The FDCPA "grants a private right of action to a consumer who receives a communication that violates the Act." *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 91 (2d Cir. 2008). To establish a violation under the Act,

> (1) the plaintiff must be a "consumer" who allegedly owes the debt or a person who has been the object of efforts to collect a consumer debt, and (2) the defendant collecting the debt is considered a "debt collector," and (3) the defendant has engaged in any act or omission in violation of FDCPA requirements.

Plummer v. Atl. Credit & Fin., Inc., 66 F. Supp. 3d 484, 488 (S.D.N.Y. 2014) (internal citation omitted).

Under the FDCPA, "debt collector" is defined, in relevant part, as

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . [T]he term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.

15 U.S.C. § 1692a(6).

2. Whether the Proposed Defendants are "Debt Collectors"

The Second Circuit has explained that the "[t]he FDCPA establishes two alternative predicates for 'debt collector' status—engaging in such activity as the 'principal purpose' of the entity's business and 'regularly' engaging in such activity." *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F.3d 56, 61 (2d Cir. 2004) (citing 15 U.S.C. § 1692a(6)). Further, it held that "the question of whether [an entity] 'regularly' engages in debt collection activity within the meaning of section 1692a(6) of the FDCPA must be assessed on a case-by-case basis in light of factors bearing on the issue of regularity," including,

> (1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s), (2) the frequency of such communications and/or litigation activity, including whether any patterns of

> such activity are discernable, (3) whether the entity has personnel specifically assigned to work on debt collection activity, (4) whether the entity has systems or contractors in place to facilitate such activity, and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the [entity] to assist in the collection of outstanding consumer debt obligations. Facts relating to the role debt collection work plays in the practice as a whole should also be considered to the extent they bear on the question of regularity of debt collection activity.

Id. at 62-63.

It is acknowledged that Defendants DNSC and CACH are debt collectors under the statute. Dkt. No. 13 at ¶ 8; Dkt. No. 15 at ¶ 14. With regard to SquareTwo and its relationship with CACH, it is true that an entity that shares "common ownership or [is] affiliated by corporate control" may engage in debt collection services, but the company on whose behalf that entity collects is not *necessarily* a "debt collector" by virtue of that relationship if its principal business is not debt collection. 15 U.S.C. § 1692a(6)(B); *see LaCourte v. JP Morgan Chase & Co.*, 2013 WL 4830935, at *3–5 (S.D.N.Y. Sept. 4, 2013). Nevertheless, the Proposed Amended Complaint sufficiently alleges that SquareTwo itself regularly engages in debt collection activities and that such activities are its principal purpose. Prop. Am. Compl. at ¶¶ 15-25. Indeed, it is alleged in the Proposed Amended Complaint that according to its own SEC filings, SquareTwo is "a leading purchaser of charged off consumer and commercial receivables in the account receivable management industry." *Id.* at ¶ 15. Therefore, SquareTwo is properly alleged to be a debt collector.

Next, proposed Defendant Attorney James Scully should also be considered a debt collector, as the Proposed Amended Complaint alleges that "his principal business endeavor is the collection of debts." *Id.* at ¶ 52. Case law is clear that individuals employed by debt collection corporations can be considered debt collectors themselves, and that rationale applies to attorneys who are regularly engaged in debt collection activities. *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995) (holding that the FDCPA applies to a lawyer who regularly tries to obtain payment through legal proceedings); *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 437 (6th Cir. 2008) ("[T]here is no doubt that in a generic sense a person who authors collection letters, supervises collection activities, and is the sole attorney in a debt collection firm is a 'debt collector' as defined by the FDCPA.") (internal citations omitted). The Plaintiff's allegation in this regard is sufficient.

Finally, it is alleged that proposed Defendants Lowery and Larkins, as officers and managers of CACH and SquareTwo, regularly attempt to collect debts, and their principal business is the collection of debts, and therefore they qualify under the act. Prop. Am. Compl. at ¶ 29. "A high-ranking employee, executive, or director of a collection agency may fit within the statutory definition of a debt collector as long as the defendant was personally involved in the collection of the debt." *See Williams v. Prof'l Collection Servs., Inc.*, 2004 WL 5462235, at *4 (E.D.N.Y. Dec. 7, 2004). While disputed, this allegation in the Proposed Amended Complaint is sufficient to allege that Lowery and Larkins are covered by the FDCPA.

3. Liability of the Proposed Defendants Under the FDCPA

The question of futility requires to Court to next consider the proposed Defendants' liability for the conduct alleged in the Proposed Amended Complaint. As a general matter, the FDCPA imposes liability on "debt collectors" who engage in prohibited activities. 15 U.S.C. § 1692e. However, the fact that an individual or entity qualifies as a debt collector does not mean that they violated the FDCPA. *Cruz v. Int'l Collection Corp.*, 673 F. 3d 991, 999-1000 (9th Cir. 2012); *Hawkins-El v. First Am. Funding, LLC*, 891 F. Supp. 2d 402, 409 (E.D.N.Y. 2012).

Because the FDCPA provides that a debt collector "regularly collects or attempts to collect, directly *or indirectly*, debts," 15 U.S.C. § 1692a(6) (emphasis added), the plain language of the statute accounts for situations in which a debt collector uses indirect means to collect a debt. Hiring a third party debt collection agency or law firm to assist in everyday debt collection activities falls squarely within this definition, particularly where, as here, the third party entities worked pursuant to governing procedures provided by the debt collector. *Polanco v. NCO Portfolio Mgmt., Inc.*, 132 F. Supp. 3d 567, 580 (S.D.N.Y. 2015); *see also Suquilanda v. Cohen & Slamowitz, LLP*, 2011 WL 4344044, at *10 (S.D.N.Y. Sept. 8, 2011).

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Further, the Supreme Court has made clear that "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396 (1993) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962)). A defendant who "voluntarily chose this attorney as [its] representative in the action, . . . cannot now avoid the consequences of the acts or omissions of this freely selected agent." *Link v. Wabash R.R. Co.*, 370 U.S. at 633-34 (internal citation omitted).

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Additionally, "vicarious liability may attach in the context of an attorney-client relationship where both the attorney and its client constitute 'debt collectors' under the FDCPA." *Okyere v. Palisades Collection, LLC*, 961 F. Supp. 2d 508, 516 (S.D.N.Y. 2013) (citing *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1515-16 (9th Cir. 1994) ("In order to give reasonable effect to section 1692i, we must conclude that Congress intended the actions of an attorney to be imputed to the client on whose behalf they are taken.")); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 600-01 (2010) ("Some courts have held clients vicariously liable for their lawyers' violations of the FDCPA.").

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District Courts in this Circuit disagree about the appropriate test for determining when a principal may be held vicariously liable for its agent's actions under the FDCPA. Some courts require that a debt collector "exercise control" over the attorney, while others require only that the agent be acting "within the scope their authority." *Compare Okyere*, 961 F. Supp. 2d at 515-17 (discussing various tests for vicarious liability under FDCPA and holding that "scope of authority" is the appropriate test) *with Bodur v. Palisades Collection, LLC*, 829 F. Supp. 2d 246, 259 (S.D.N.Y. 2011) ("To be vicariously liable under the FDCPA, however, 'the principal must exercise control over the conduct or activities of the agent.'") (citing *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1173 (9th Cir. 2006)).

With respect to SquareTwo, that dispute is not determinative, as the Proposed Amended Complaint sufficiently alleges that CACH and SquareTwo both exercised control over the DNSC law firm. In particular, the Proposed Amended Complaint alleges that the DNSC Law Firm worked exclusively for CACH and SquareTwo in a franchiser/franchisee type relationship over a "closed loop" network, with the corporate Defendants exercising extensive oversight and control. Prop. Am. Compl. at ¶¶ 38-48. Thus, the Corporate Defendant SquareTwo is properly alleged to be responsible for the FDCPA violations of its selected and closely supervised law firm.

Accordingly, Plaintiff's request to add SquareTwo as an additional Defendant is **granted**. SquareTwo is a debt collector under the statute and the facts of this case and has, according to the Proposed Amended Complaint, coordinated with CACH and DNSC to perform collection activities. These allegations, accepting them as true as the Court must, establishes that such an amendment would not be futile. None of the Defendants argue that this amendment would cause any prejudice or undue delay, and in fact CACH does not oppose the amendment in this regard.

Next, the allegations regarding Attorney Scully are also sufficient to overcome any futility argument. Officers or employees of a debt collecting agency may be held liable where they personally engage in the prohibited conduct. *Krapf v. Prof'l Collection Servs., Inc.*, 525 F. Supp. 2d 324, 327 (E.D.N.Y. 2007) (collecting cases). Here, the Proposed Amended Complaint alleges that Attorney Scully is not only the principal and owner of DNSC, but more importantly, that he personally had final supervisory authority over all the form documents utilized by the DNSC Law Firm, including the alleged defective summons that forms the heart of the alleged violation of the FDCPA. Prop. Am. Compl. at ¶ 51. The specific allegation in the Proposed Amended Complaint that Attorney Scully approved the use of the defective summons is sufficient to allow this Proposed Amended Pleading to go forward against him. *See Clomon v. Jackson*, 988 F.2d 1314, 1317, 1320 (2d Cir. 1993) (holding that an attorney who was listed on mass mailing was personally responsible for the violation of the FDCPA where he approved the form letters utilized by the collection agency, even though he played no day-to-day role in the debt collection process).

The claims against proposed Defendants Lowery and Larkins, however, require a different analysis. Based upon the pleadings, it is evident that those two individuals, while allegedly involved in "overseeing" the corporations' debt collection businesses, Prop. Am. Compl. at ¶ 28, had no involvement with the summons at issue. Indeed, there is no specific, non-conclusory allegation in the Proposed Amended Complaint that they did. While the companies that they work for may have generally imposed guidelines and limitations upon DNSC regarding their litigation and reporting practices, the Proposed Amended Complaint does not indicate that any particular member of corporate management required the defective summons, or even that Larkins and/or Lowery were aware that such summons was being used in New York. While cases hold that a principal is responsible for violations of the FDCPA committed by its counsel, the present Proposed Amended

Complaint goes beyond this theory to impute liability to two individual defendants. The DNSC Law Firm was retained by CACH, and potentially by its alter ego, SquareTwo, and not by either Mr. Larkins or Mr. Lowery. Insofar as the Proposed Amended Complaint seeks to impose vicarious strict liability on two officers of a corporation for the acts of the DNSC Law Firm, without a showing of any personal involvement in the misconduct, it goes a step too far, and would not survive a motion to dismiss. *Allison v. Whitman & Meyers*, 2015 WL 860757, at *2 (W.D.N.Y. Feb. 27, 2015) (stating that where a plaintiff alleges no specific conduct on the part of an individual defendant, dismissal of the FDCPA complaint is appropriate); *see also Gerstle v. Nat'l Credit Adjusters, LLC*, 76 F. Supp. 3d 503, 510 (S.D.N.Y. 2015) (granting motion to dismiss and noting that "nothing in the Complaint indicates that any of these individuals . . . were 'primary actors' in the specific matter at hand – the collection letters sent to Gerstle and Couser.").[3]

IV. CONCLUSION

Under the 12(b)(6) standard, Miranda has stated sufficient facts to state a plausible theory of FDCPA liability against new Defendants SquareTwo Financial Corporation and Attorney James Scully, but not as to P. Scott Lowery or Paul A. Larkins.

Accordingly, it is hereby

ORDERED, that Plaintiff's Motion to Amend the Complaint (Dkt. No. 39) is **granted in part and denied in part**, as set forth above; and it is further

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[3] The decision in *Gerstle* was based upon lack of personal jurisdiction, and that same impediment also applies to the case against Lowery and Larkins. As noted in *Gerstle*, in cases involving the FDCPA, federal courts look to the forum state to determine personal jurisdiction. *Gerstle v. Nat'l Credit Adjusters, LLC*, 76 F. Supp. 3d 503, 510 (S.D.N.Y. 2015). New York's long arm statute, N.Y. C.P.L.R. 302(a), allows jurisdiction over a nondomiciliary who, through an agent, transacts any business within the state. To establish agency, a plaintiff must show that the agent acted within the state "in relation to the transaction for the benefit of and with the knowledge and consent of the . . . defendants and that they exercised some control over [the agent] in the matter." *Kreutter v. McFadden Oil Corp.*, 71 N.Y. 2d 460, 467 (N.Y. 1988). In *Gerstle*, the court concluded that the generalized allegations regarding the claim that the individual "oversaw" or "authorized" illegal practices was insufficient to confer jurisdiction. *Gerstle*, 76 F. Supp. 3d at 510-11.

ORDERED, that the Plaintiff shall serve and file an Amended Complaint that is consistent with this Memorandum-Decision and Order on or before **August 12, 2016**. Upon the filing of the Amended Complaint, the Clerk shall issue Summonses for the newly named Defendants; and it is further

ORDERED, that Defendants shall respond to the Amended Complaint in accordance with the Federal Rules of Civil Procedure; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Date: July 27, 2016
Albany, New York

Daniel J. Stewart
U.S. Magistrate Judge